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CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2009-6

I. Summary

The city administration did not violate the ethics law prohibiting the use of city resources for political purposes when it circulated a taxpayer-funded brochure on rail transit in the city's newspapers just prior to the November 2008 election, which included a ballot measure on rail transit. The brochure did not violate the ethics laws, because the mayor has the implied power to spend public funds to inform and educate the public about matters of public concern, including matters that are subject to a vote, and because the brochure did not constitute partisan advocacy by expressly or implicitly urging the voters to cast their ballots a particular way.

II. Introduction

In October 2008, the Ethics Commission received two complaints about a glossy brochure on the Honolulu rail transit project that was included as an insert in Honolulu newspapers in October 2008. Both complaints alleged that the brochure, which was paid for by the city's taxpayers, was political in nature because it was circulated approximately two weeks before the November 4, 2008 general election in which the public was to vote on a proposed city charter amendment concerning the city's plans to begin building a steel wheel on steel rail transit system. Rail transit was an important issue in Mayor Mufi Hannemann's re-election campaign.

In general, the city's mayor has the power to spend public funds to inform and educate the public about matters of public concern, including matters that are subject to a vote. The mayor, however, is not authorized to go beyond this power to educate and inform by becoming a partisan advocate on election matters – that is, by expressly or implicitly urging the voters to cast their ballots a particular way. This would violate the city's ethics laws prohibiting city officials from using public resources for political purposes.

The central question in this case, therefore, is whether the rail transit brochure was informational or whether it urged the voters to vote a certain way on the proposed charter amendment. In our opinion, when viewed under the appropriate standards, the brochure did not

urge the voters to vote a certain way on the proposed amendment. Thus, the mayor's expenditures on the brochure did not violate the city's ethics laws.

III. Background

Since August 2005, the city has spent more than \$5.6 million on a public involvement program related to its rail transit project (the "Honolulu High Capacity Transit Corridor Project"). Among other things, the program included a website (www.honolulutransit.org), a rail transit hotline, radio and television commercials and programs, newsletters, and community meeting presentations. The money was spent, at least in part, in connection with the city's efforts to obtain federal financial support for the rail transit project and to comply with applicable federal regulations that required the city to develop a public involvement program.¹

In October 2008, the city spent approximately well over \$100,000 on a glossy color brochure (the "Brochure") that was included as an insert in the Sunday, October 19, 2008 editions of the *Honolulu Advertiser* and *Honolulu Star-Bulletin* and in the October 22, 2008 edition of *MidWeek*. According to the city's Department of Transportation Services (DTS), the Brochure, a copy of which is attached as an exhibit, was part of the city's on-going compliance with the federal public involvement program requirements.

The Brochure addressed a number of issues regarding the proposed steel wheel on steel rail transit project and was generally representative of the content of the city's overall rail transit public involvement program. It included information about proposed routes, overall costs, funding sources, anticipated traffic congestion reduction, noise levels, and projected economic benefits. According to DTS, much of the information in the Brochure was contained in the project's draft environmental impact statement (DEIS), which was being finalized at the time. The Brochure did not contain any expressly political messages or information and did not mention Mayor Hannemann at all.

Significantly, the Brochure's dissemination in the Honolulu's newspapers came about two weeks before the November 4, 2008 general election. Rail transit had become an election issue, partly because it was an important issue in Mayor Hannemann's re-election campaign and partly because it was the subject of a proposed amendment to the city's charter, which was on the November 4, 2008 ballot. According to DTS, the timing of the dissemination of the Brochure was not driven by the election, but by the imminent public release of the DEIS, which occurred on November 2, 2008.

The proposed charter amendment (the "Ballot Measure") posed the following question to the city's voters: "Shall the powers, duties and functions of the city, through its director of

¹ For example, to receive federal funding, the city's rail transit project is subject to the Metropolitan Transportation Planning and Statewide Transportation planning requirements as set forth in 23 C.F.R. Part 450, subpart B. These regulations require "a public involvement process [that] at a minimum shall . . . [e]stablish early and continuous involvement opportunities that provide timely information about transportation issues and decisionmaking processes to citizens, affected public agencies . . . and other interested parties[.]" 23 C.F.R. § 450.210(a)(1)(i). In addition, the rail transit project has to comply with the federal National Environmental Protection Act of 1969, as amended (42 U.S.C. 4321, *et seq.*), and compliance (*e.g.*, environmental impact statements) involves a public involvement process. 23 C.F.R. § 771.111.

transportation services, include establishment of a steel wheel on steel rail transit system?" The Ballot Measure passed, with 50.6% of the voters voting "Yes" on the question. Mayor Hannemann won re-election, receiving 56.1% of the vote.

IV. Question Presented

Did the expenditures on the Brochure constitute the use of public resources for political purposes in violation of the city's ethics laws?

V. Analysis

A. Relevant ethics laws

Section 11-104 of the Revised Charter of Honolulu (RCH) provides:

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

This provision mandates that public resources can only be used for city, as opposed to personal or non-city, purposes. Advisory Opinion No. 2001-1.² The Commission has consistently interpreted RCH § 11-104 as prohibiting city officers and employees from using any city resources for political purposes, which are, by definition, non-city purposes. As the Commission recently stated:

The purpose underlying the prohibition against the use of government resources for political purposes is to protect against the exploitation of taxpayer resources for the benefit of a political candidate. Performing campaign work on city time or with other city resources deprives the public of the services of city officers and employees. Moreover, when city resources are turned to political use, one candidate receives an unfair advantage paid for by the public. Consequently, the Commission has interpreted Section 11-104, Revised Charter of Honolulu (RCH) to prohibit the use of city resources for political purposes and activities.

Advisory Opinion No. 2009-1 (footnote omitted). *See also* Advisory Opinions Nos. 2002-5 and 2008-5 and *Revised Guidelines on Campaign Activities*.

² Article VII, Section 4 of the Hawai'i Constitution also prohibits the use of public funds for non-public purposes:

No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly, or indirectly, except for a public purpose. No grant shall be made in violation of Section 4 of Article I of this constitution. No grant of public money or property shall be made except pursuant to standards provided by law.

B. What constitutes a legitimate city purpose under RCH § 11-104?

In Advisory Opinion No. 2005-4, the Commission considered whether the Harris administration's expenditure of \$108,000 to publish *The Renaissance of Honolulu* book was for a city purpose or whether, as its critics contended, it was for the non-city purpose of the personal and political aggrandizement of the Mayor. In that case, the Commission noted that

[a] key element to the existence of a violation of RCH § 11-104 is that the city resource must be misappropriated for a non-city use, that is, *a use not within the scope or duties expressly or implicitly associated with the position of the city officer or employee whose conduct is in question*. Generally, the use of resources for a project not within the officer's or employee's duties would be in violation of RCH § 11-104.

The converse of this statement is equally true: use of resources for a project that is performed within the officer or employee's scope of duties generally is not a violation of RCH § 11-104.

(Emphasis added.) *See also* Advisory Opinion 2002-2. The Commission concluded that the use of public funds to publish the book, whose contents “highlight[ed] the transitions that occurred” during the Harris administration and included a discussion of “topics of public interest” was authorized by “the mayor's ‘power to . . . make periodic reports informing the public as to city policies, programs and operations[,]’” which is expressly granted to the mayor under by RCH § 5-103(j). As a result, the Commission concluded that the Harris administration did not misuse city resources by publishing *The Renaissance of Honolulu* book because the expenditure came within a power expressly granted to the mayor and it therefore had a legitimate city purpose.³

Thus, as the Commission indicated in Advisory Opinion No. 2005-4, in cases involving the alleged misuse of city resources by a public official, a key initial inquiry is whether the use of resources falls within the official's express or implied powers or duties. An expenditure that is made without express or implicit authorization is, by definition, not for a legitimate city purpose and would constitute a violation of HRS § 11-104.⁴

³ The Ethics Commission made clear that its conclusion was not a determination that the expenditure of taxpayer funds on the book was wise, but only that it was authorized:

The Commission's opinion should not be read as an endorsement of *The Renaissance of Honolulu*. It is not for the Commission to decide whether publishing the book was a wise or imprudent use of public funds. Instead, the Commission may only determine if there was a misuse of public funds under the ethics laws. Regardless of whether or not one believes the money was well spent, it was within the authority of the administration to expend the funds because publishing the book may reasonably be viewed as an attempt to inform the public about the city's policies, programs and operations.

Advisory Opinion No. 2005-4.

⁴ Most courts that have addressed the question whether the expenditure of public funds was for a legitimate public purpose apply a similar approach to the one followed in Advisory Opinion No. 2005-4. That is, they make a threshold inquiry regarding whether the government agency or official authorizing the expenditure of taxpayer funds

C. **Did the Mayor have the express or implicit power to spend city funds on the Brochure?**

1. **The mayor's express powers.**

The powers of the mayor are set forth primarily in RCH § 5-103. Among the broad powers granted to the mayor as the city's chief executive officer are the powers to: directly supervise the city's executive agencies; appoint necessary staff for which appropriations have been made by the council; submit operating and capital programs and budgets to the city council; present information or messages to the council which, in the mayor's opinion, are necessary or expedient; and make periodic reports informing the public as to city policies, programs and operations.

If the Brochure – which does not mention the Ballot Measure or Mayor Hannemann at all -- were viewed simply on the contents found within its four corners, we would have little difficulty concluding that the Mayor's expenditure of public funds on the Brochure was within his express "power to . . . make periodic reports informing the public as to city policies, programs and operations." RCH § 5-103(j). Like the *Renaissance of Honolulu* book at issue in Advisory Opinion No. 2005-4, the Brochure could be fairly read as a report on an important city project that fell within the ambit of RCH § 5-103(j).

Our analysis, however, cannot ignore the context in which the Brochure was disseminated to the public. The Brochure was inserted in Honolulu's major newspapers just weeks before the public was to vote on Mayor Hannemann's re-election bid and on the Ballot Measure, which was widely viewed as a referendum on the rail transit issue. It is fair to say that at the time the Brochure was circulated rail transit and the Ballot Measure were prominent political issues. In this context, the Brochure could reasonably be viewed as something more than just a "report informing the public as to city policies, programs and operations", but as material directly related to the election campaign and even targeted at the Ballot Measure, notwithstanding the fact that it did not explicitly mention Mayor Hanneman or the proposed charter amendment. This is how the complainants viewed the material and in our opinion their reading of the Brochure is not unreasonable. *See Stanson v. Mott*, 17 Cal.3d at 222, 551 P.2d at 12 (the propriety of an expenditure "depends upon a careful consideration of such factors as the

had either the express or implied power to make the expenditure. *See, e.g., Rees v. Carlisle*, 113 Hawai'i 446, 453 (2007) (although city prosecuting attorney lacked the explicit power to use public funds to publicly comment on proposed charter amendment concerning direct filing of criminal charges, "the power to publicly comment on ballot measures that implicate the manner in which he can initiate prosecutions is fairly implied from his power and duty to prosecute crimes[.]"); *Burt v. Blumenauer*, 299 Or. 55, 72, 699 P.2d 168, 179 (1985) (in determining whether an expenditure for government speech is for a legitimate public purpose, "[t]he first question [is] whether authority exists for the expenditure."); *Stanson v. Mott*, 17 Cal.3d 206, 213, 551 P.2d 1, 6 (1976) ("We start with the general principle that expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment."); *Citizens to Protect Public Funds v. Board of Education*, 13 N.J. 172, 179, 98 A.2d 673, 676 (1953) (board of education had implied power to make reasonable expenditures for purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting on school bond election proposal).

style, tenor and *timing of the publication*; no hard and fast rule governs every case.” (Emphasis added and footnote omitted.)).

The city disputes that the Brochure was specifically directed at the upcoming election. Instead, it maintains that the timing and content of the Brochure were driven by the imminent release of the DEIS and that the Brochure was a simply piece of the city’s on-going rail transit public involvement program. While that may be true, it must be acknowledged that at least some voters would use the information in the Brochure to help them decide which way to vote on the Ballot Measure, even if that was not the specific intent behind the publication of the Brochure. After all, one of the main reasons behind the federally mandated public information programs is to help citizens make informed decisions about large-scale public projects such as the city’s rail transit project. And the Ballot Measure certainly called for the public to make a decision on the city’s rail transit project. As a result, we believe that the our analysis must assume that one of the purposes of the Brochure, even if it were somewhat indirect, was to provide information to voters regarding the Ballot Measure.

Viewed in this way, the question is not simply whether the mayor is expressly authorized to spend public funds to “inform[] the public as to city policies, programs and operations” in general, but whether he/she is authorized to spend public funds for the specific purpose of informing the public about (or even to advocate for passage of) matters that are subject to a public vote, such as the Ballot Measure. We are unaware of any charter powers, including RCH § 5-103(j), or any other laws or resolutions that expressly grant the mayor this specific power.

2. The mayor’s implicit powers

Notwithstanding the lack of any express authorization supporting the Mayor’s expenditures to inform the public with regard to the Ballot Measure, the expenditures would still have a legitimate city purpose if they fell within an implied power granted to the mayor. Advisory Opinion No. 2005-4. We believe that the city charter provides such an implied power.

As noted, under RCH § 5-103(j) the mayor is expressly granted the “power to . . . make periodic reports informing the public as to city policies, programs and operations.” It is evident to us that one of the underlying purposes of this provision is to keep the public informed about matters of important public concern. It is also obvious that matters of important public concern are sometimes subject to a public vote. Thus, even though RCH § 5-103(j) does not expressly authorize the mayor to spend funds for the specific purpose of informing the public about a matter that is subject to a public vote, we conclude that RCH § 5-103(j) necessarily carries an implicit authorization to do so.

Our conclusion follows the basic logic the Hawai`i Supreme Court applied in *Rees v. Carlisle* when it held that the city prosecutor had the implied power to comment on a ballot measure that affected his core function: “[T]he power to publicly comment on ballot measures that implicate the manner in which the city prosecuting attorney can initiate prosecutions is fairly implied from his power and duty to prosecute crimes[.]” 113 Hawai`i at 453. It also finds support in Advisory Opinion No. 2002-2. In that case, the Commission concluded that the use of city resources in letter-writing campaign asking members of the public to voice their concerns or

attend a council budget meeting and oppose possible funding cuts by the city council did not violate the fair and equal treatment policy:

Given the administration's stake in the outcome of budget deliberations and its right to comment on the policies and actions of the legislative branch, the Commission finds that it is within the scope of the discretionary duties and responsibilities of the administration to inform the public of the administration's position on budget matters and to encourage the public to state their concerns to the Council.

3. The mayor's implicit power to inform does not permit partisan advocacy on election matters

There are limits, however, to this implied power to spend public funds in connection with a matter that is subject to a public vote. The most fundamental limitation emanates from RCH § 11-104, which prohibits the use of public resources for partisan political purposes. See Advisory Opinion No. 2002-5. When the government adds its voice to the debate on matters the public will pass judgment on in the ballot booth, there is the potential that this power will be misused for political purposes and, consequently, be anti-democratic:

Underlying th[e] uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office * * *; the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.

Stanson v. Mott, 17 Cal.3d at 217, 551 P.2d at 9. See also *Stern v. Kramarsky* 84 Misc.2d 447, 452, 375 N.Y.S.2d 235 (1975): ("It would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propaganda in favor of or against any issue or candidate.").

These potential anti-democratic effects are precisely why our city charter prohibits the use of city resources for political activities. See Advisory Opinion No. 2009-1. Urging voters to vote a certain way on an election matter is a political activity. Thus, while the mayor may have the implicit power to spend public funds in connection with ballot measures, the mayor's communications must clearly stop short of "taking sides" in the election. That means that communications can only extend to providing information to help voters make a knowledgeable voting decision; they cannot cross the line into campaign-style electioneering. In other words, the mayor can use public funds to inform and educate, but not to advocate as a political partisan.

4. What constitutes partisan advocacy?

Partisan advocacy is easy to identify when it is express. Exhortations urging voters to vote in a certain way on an election matter -- “vote Yes” or “vote No” -- are clear cut examples of partisan advocacy. “Vote for,” “vote against,” “elect,” “support,” “cast your ballot for,” “defeat,” and “reject,” are other examples of express words of partisan advocacy. *Buckley v. Valeo*, 424 U.S. 1, 44, n. 52, 96 S.Ct. 612, 644, n. 52 (1976). Appeals to vote a particular way that use these express words of partisan advocacy constitute political activities that clearly cannot be funded with public resources. RCH § 11-104; Advisory Opinion No. 2009-1; *see also Rees*, 113 Hawai'i at 453 (urging voters to vote “Yes” on a proposed constitutional amendment concerning direct filing of felony charges constituted impermissible partisan advocacy); *Citizens to Protect Public Funds*, 13 N.J. at 180-81, 98 A.2d at 677 (“The exhortation ‘Vote Yes’ is repeated on three pages, and the dire consequences of the failure so to do are over-dramatized In that manner the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperiled the propriety of the entire expenditure.”).

Not all partisan advocacy, however, is so blunt. Certain communications can implicitly urge voters to vote a particular way on an election matter even though they eschew express words of advocacy. For example, a communication can present information that is so heavily one-sided, or make arguments that favor only one side of a debate, that it can only reasonably be interpreted as an unspoken appeal to vote a particular way. These communications are, in other words, the “functional equivalent” of express partisan advocacy, since they serve the same political purpose – influencing voters to vote a certain way. *See McConnell v. Federal Election Commission*, 540 U.S. 93, 126, 124 S.Ct. 619, 650 (2003) (“While the distinction between “issue” and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words.” (Footnote omitted.)).⁵ Thus, communications that are the functional equivalent of express partisan advocacy – *i.e.*, that implicitly urge a particular vote on an election matter – also cannot be financed with public funds. RCH § 11-104; *see also Stanson v. Mott*, 17 Cal.3d at 222, 551 P.2d at 11 (“[W]hile past cases indicate that public agencies may generally publish a ‘fair presentation of facts’ relevant to an election matter, in a number of instances publicly financed brochures or newspaper advertisements which have purported to contain only relevant factual information, and which have refrained from exhorting voters to “Vote Yes,” have nevertheless been found to constitute improper campaign literature.”).

The determination as to when a communication is the functional equivalent of express partisan advocacy will necessarily depend on the particular facts and circumstances in each case. *See Stanson v. Mott*, 17 Cal.3d at 222, 551 P.2d at 12 (the propriety of an expenditure “depends

⁵ This type of implicit advocacy can be even more powerful than express advocacy. *See McConnell*, 540 U.S. at 126-27, 124 S.Ct. at 650-51 (“Little difference existed, for example, between an ad that urged viewers to ‘vote against Jane Doe’ and one that condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’ Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words.” (Footnotes omitted.))

upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case.” (Footnote omitted.); *see also Blumenaur*, 299 Or. at 69, 699 P.2d at 176 (distinguishing between partisan and non-partisan speech or information from advocacy is difficult because “[n]on-partisan aspects such as informing the populace of government policy and explaining that policy are also necessarily partisan because incumbent candidates almost invariably claim that their reelection is justified by their link to the government policy they explain and defend.” (Quoting Shiffrin, *Government Speech*, 27 U.C.L.A.L.Rev. 565, 603 (1980))).

In determining where the line is drawn in a particular case, we must be mindful of the fact that the dissemination of information to voters on matters of public concern is an important function of government, as RCH § 5-103(j) recognizes. *See* Advisory Opinion No. 2002-2 (“Because the city budget is essential to the function of the city government, it is inherent that the executive branch may comment or oppose the budgetary modifications offered by the legislative branch of government. This is especially true when available revenues may be strained to meet the competing demands for government services.”). Accordingly, in analyzing whether a communication is the functional equivalent of express partisan advocacy, we must be careful not to be overly subjective or to simply “second-guess” or substitute our judgment for the mayor’s, as this would have a chilling effect on the mayor’s efforts to perform his/her important educational function. *See* Advisory Opinion No. 2002-2 (the Commission will not second-guess the administration’s determination of what costs were justified in connection with a legitimate effort to mobilize public support for its budget proposals).

Thus, we must strike an appropriate balance between giving the mayor sufficient latitude in exercising his/her charter-given power to inform and educate, while at the same time allowing the Commission to discharge its duty to enforce the ethics laws’ prohibitions against using city resources for political purposes. The following standard, we believe, strikes the appropriate balance between these two potentially competing interests: a communication should only be considered the functional equivalent of express advocacy when, under the relevant circumstances and when read as a whole, it can only reasonably be interpreted as an exhortation to vote a particular way on an election matter. *See Federal Election Commission v. Wisconsin Right To Life*, 551 U.S. 449, 469-70, 127 S.Ct. 2652, 2667 (2007) (under the “McCain-Feingold” Bipartisan Campaign Reform Act, “an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”). For example, a communication that does not contain express words of partisan advocacy, but presents only one-side of an issue or over-dramatizes the negative consequences of taking a particular side of an issue, would be the functional equivalent of express advocacy if it were susceptible of no reasonable interpretation other than as an appeal to vote for or against a ballot measure or a political candidate. This does not mean that a communication must be completely neutral and perfectly balanced to avoid being deemed the functional equivalent of express partisan advocacy under RCH § 11-104. It simply means that it must fall short of being read no other way than as a “vote for” or “vote against” an election issue or candidate.

5. Summary

The mayor has the implicit power to spend public funds to inform and educate the public in connection with an election matter, such as the Ballot Measure. The mayor however, oversteps this power and violates RCH § 11-104 if his/her communications are not fundamentally informative and educational, but cross the line into partisan advocacy. A communication amounts to partisan advocacy if: (1) it uses words that expressly urge the voters to vote a particular way with respect to a specific issue or candidate; or (2) even if it does not use words of express advocacy, it nevertheless is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific issue or candidate.

With respect to the Brochure, then, the critical inquiry is whether it expressly or implicitly urged the voters to vote “yes” on the Ballot Measure.

D. Did the Brochure amount to partisan advocacy?

1. Does the Brochure expressly urge the voters to vote a certain way on the Ballot Measure?

The Brochure does not explicitly mention the Ballot Measure and it therefore obviously does not expressly urge the voters to vote a certain way on the question. Accordingly, there is no basis to conclude that RCH § 11-104 was violated by any express appeals in the Brochure to vote “Yes” on the Ballot Measure.

2. Does the Brochure implicitly urge the voters to vote a certain way on the Ballot Measure?

The funds expended on the Brochure would constitute an impermissible expenditure of public funds for a non-city purpose in violation of RCH § 11-104 if the Brochure is the functional equivalent of an express appeal to vote a certain way on the Ballot Measure --- *i.e.*, if read as a whole and in context the Brochure is susceptible of no reasonable interpretation other than as an appeal for an affirmative vote on the Ballot Measure. To make this determination, a close reading of the Brochure is required.

a. The contents of the Brochure

The eight-page Brochure contains a significant amount of factual information about the rail transit project, including a basic overview of the project, which is described as

a proposed 20-mile elevated rail line that will connect West O`ahu with downtown Honolulu and Ala Moana and, one day, will extend even further to Honolulu International Airport, Waikiki, UH Manoa and Kalaeloa. The system features 200-foot-long electric, steel-wheel trains capable of carrying more than 300 passengers each. Trains can carry more than 6,000 riders per hour. By 2030, up to 90,000 riders per day are expected to use rail transit.

In addition to providing an overview of the rail transit plan, the Brochure describes the goals of the project (*e.g.*, improved mobility, reliability, improving the economy) and an explanation of how those goals will be met. Among other things, the reader of the Brochure is told that rail transit:

1. Will reduce traffic congestion by more than the major mass transit alternatives and is the most cost-effective solution to traffic congestion.

E.g.: “[A] detailed Alternatives Analysis showed that a rail transit system could reduce future traffic congestion by 11%, while simply increasing the number of buses would reduce future traffic congestion by just 1.3%. Adding toll lanes or roads would actually increase future traffic congestion. . . . Building rail transit now is the most cost-effective way to avoid even more congestion in the future.”

2. Is the most reliable form of mass transit.

E.g.: “The elevated system will operate with precision and reliability. So, if you need to be at work by 8 a.m., you’ll arrive at work by 8 a.m., even if it’s raining or there’s a big accident on H-1.”

3. Will improve the economy.

E.g.: Rail transit “will generate an estimated 11,000 jobs in construction and related industries. Transit-oriented development – the creation of shops, services, and housing in the vicinity of transit stations – will attract new investment and create even more jobs.”

4. Will protect the environment.

E.g.: “Building rail transit has long been viewed by health experts as an excellent way to limit harmful vehicle emissions and improve air quality. The transportation sector is one of the largest contributors to greenhouse gas emissions and our island’s carbon footprint. Rail transit enhances our environmental quality of life in numerous ways[.]”

5. Is not too noisy.

E.g.: “Modern steel-wheel rail transit produces less noise than diesel buses, trucks, mopeds and many automobiles. Smooth, welded rails and vibration-absorbing fasteners eliminate much of the noise we associate with traditional rail travel.”

6. Can be built within its budget and be paid for with already identified funding sources.

E.g.: “Rail transit is the most cost-effective option among those studied, including expanding bus service or building a [High-Occupancy Toll] lane viaduct. The initial route from East Kapolei to Ala Moana Center can be paid for with already identified funding sources. No additional taxes are needed for construction. . . . Federal funding is expected to increase significantly as the project moves to construction. . . . Even when adjusted for inflation (see table below) and allowing for fluctuations in the economy, Honolulu Rail Transit can be built within budget.”

7. Will benefit non-users by reducing overall automobile traffic congestion.

E.g.: “It is estimated that rail transit will help keep more than 25,000 cars off O`ahu’s roads and highways each day. So even if rail transit doesn’t directly serve your neighborhood, it will help ease your commute, whether you’re coming from the Windward Side, East Honolulu, Mililani, or the North Shore.”

8. Has the support of some important public interest organizations and former public officials.

E.g.: “‘Rail is tested and trusted in cities across the United States and in countries throughout the world. Rail is a modern, reliable, convenient, and environmentally-friendly alternative to clogged freeways and expensive fossil fuels that pollute our air.’ – Former state transportation directors Fujio Matsuda, Ed Hirata, Kazu Hayashida and Rod Haraga, and former deputy state health director James Kumagai.”

9. Will attract enough riders.

E.g.: “Judging both by national trends of rail ridership and by current Honolulu ridership of TheBus, the answer [to the question of whether rail transit will attract riders in Honolulu] is a resounding YES.”

10. Is an important investment in Hawaii’s future.

E.g.: Referring to past large-scale public projects such as the Pali Tunnels and Highway, H-1, H-2 H-3, and Ala Moana and Central O`ahu parks: “The community leaders and concerned citizens of those times past had the foresight and dedication to plan for the future, to the benefit of all of us today. Rail transit, as part of an integrated mass transit system, is an investment in Honolulu’s future – growing our economy, protecting our environment, strengthening our community, and providing reliable and affordable transportation for generations to come.”

Under any fair reading, the Brochure clearly paints a positive picture of the rail transit project. It emphasizes the beneficial aspects of the project and certainly provides more than enough information that would justify a “yes” vote on the Ballot Measure. This does not mean, however, that the Brochure amounts to partisan advocacy under the applicable standards. The question is: Is the Brochure’s positive slant on rail transit so one-sided that it is susceptible of no reasonable interpretation other than as an appeal to vote “yes” on the Ballot Measure?

Notwithstanding the clear emphasis on the positive aspects of rail transit, we believe that the Brochure does provide enough factual information that allows it to be interpreted as something other than the equivalent of a “vote yes on the Ballot Measure” pamphlet. For instance, the Brochure contains a good deal of factual information that a reader could rely on to support either a “yes” or a “no” vote on the Ballot Measure. To be sure, the reasons to cast a negative vote are presented with subtlety, primarily because the rhetorical approach of the Brochure is to present the criticisms of rail transit in a positive light and to respond to them indirectly. Thus, for example, the criticism that rail transit will be too expensive is only indirectly acknowledged and rebutted by statements that rail transit is the most cost-effective alternative and can be paid for with existing funding sources. And the criticism that a steel wheel on steel rail transit system will be too noisy is responded to with a decibel range chart that shows that rail transit is only slightly louder than a normal conversation and less noisy than city buses.

Nevertheless, the basic approach of the Brochure is fact-based and these facts can lead to different opinions on the question presented in the Ballot Measure. For instance, the Brochure very clearly states the overall anticipated cost of the project, in both 2006 dollars (\$3.72 billion) and year-of-expenditure dollars (\$4.98 billion). The Brochure includes a “pie-chart” describing the components of the overall cost and identifies the anticipated funding sources (the ½% general excise tax surcharge and federal funding). Thus, despite the Brochure’s pro-rail bent, based on the information presented one could conclude that, even though HRT “can be built within budget” it is still too expensive; or that even though it can be funded through “already identified funding sources” the ½% general excise tax surcharge is excessive.

Similarly a reader looking for factual information in the Brochure that would help inform his/her decision on the Ballot Measure could conclude that: (1) even though a “steel-on-steel” system may be less noisy than cars or buses, it is still too noisy; (2) even though rail transit may reduce traffic congestion by 11%, that is still too little to justify the huge costs of the project; (3) even though there may be some indirect benefits to taxpayers who do not live near the proposed transit stations, these are not significant enough to outweigh the additional taxes that he/she will have to pay to fund rail transit; or (4) that the 11,000 jobs rail transit construction is “estimated” to generate are too few to justify the cost of the project.

Overall, we cannot conclude that the Brochure’s presentation of the rail transit issue is so one-sided that it amounts to partisan advocacy, *i.e.*, it can *only* be read as the functional equivalent of: “Vote ‘yes’ on the Ballot Measure.” Such a conclusion might have been easier to reach if the Brochure had explicitly referred to the Ballot Measure (or Mayor Hannemann’s re-election campaign), but, as mentioned above, the Brochure is completely silent about *any* election issues. Given this silence, in combination with the predominantly fact-based content of

the Brochure, we do not believe that the Brochure amounts to the functional equivalent of a “vote ‘yes’ on the Ballot Measure” flyer. It therefore does not constitute impermissible partisan advocacy.

VI. Conclusion

Based on the foregoing, we conclude that the expenditure of the funds on the Brochure had a legitimate public purpose and that there was no violation of RCH § 11-104.

DATED: December 18, 2009.

/S/
LEX SMITH, CHAIRPERSON
Honolulu Ethics Commission